(17)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 222

SENECA COAL AND COKE COMPANY, PETITIONER,

against

MILO LOFTON, RESPONDENT.

BRIEF OF *AMICUS CURIAE*

JOSEPH V. LANE, JR.,
Amicus Curiae.

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INDEX

TABLE OF CASES CITED

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SENECA COAL AND COKE COMPANY, PETITIONER,

v.

MILO LOFTON, RESPONDENT.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

This brief *amicus curiae* is filed pursuant to the written consent of both parties to the case, in support of the petition for certiorari. Although the petition covers a number of important points, this brief will touch on only one. It is a point of such national importance that it ought to be settled by this Court.

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 136 Fed. (2d) 359 (Advance Sheets, August 23, 1943).

Question Presented

The only point with which the present brief is concerned is whether the Court below erred in holding that an employee is entitled to liquidated damages and attorney's fees under Section 16(b) of the Fair Labor Standards Act merely because overtime was not paid currently, even though the employee did not have to demand or sue for his overtime, the employer having voluntarily and in good faith paid the overtime compensation due to the employee as soon as it became known to either of them that such overtime was due.

Statute Involved

The pertinent parts of the Fair Labor Standards Act are printed in the appendix, at page 9.

Statement

So far as relevant to the problem discussed in this brief, the facts are these:

The respondent, Milo Lofton, was hired by the petitioner, Seneca Coal and Coke Company, prior to the enactment of the Fair Labor Standards Act. He was hired to act as a night watchman at a coal strip mine at a salary of about $170 a month. He was to be on duty fourteen hours a day (later twelve hours a day) for six days a week.

Both Seneca and Lofton believed in good faith that his employment was not subject to the Fair Labor Standards Act and both also believed in good faith that, if subject to the Act, the employment contract complied with its terms.

When interpretations of the Act by the courts indicated that Lofton's employment might be within the scope of the

Act, Seneca, voluntarily and without suggestion or demand by Lofton, paid him $978.39 as overtime compensation. After the voluntary payment by Seneca, Lofton brought this suit.

The courts below have decided that Lofton is entitled to an additional payment of $978.39 as "liquidated damages" together with an attorney's fee under Section 16(b) of the Act. (There was a miscalculation of less than $20.00 which, for present purposes, may be ignored.)

Specification of Error to Be Urged

If this Court issues the writ of certiorari to review the judgment below, it will be urged that the court below erred (insofar as the question here presented is concerned) in the following respects:

(1) There is no violation of Section 7(a) of the Fair Labor Standards Act where (to quote the Act) the "employee receives compensation for his employment in excess of the hours • • • specified at a rate not less than one and one-half times the regular rate at which he is employed." Liquidated damages are not payable where the Act has been voluntarily complied with.

(2) The intention of Congress as evidenced by the very language of the statute and as shown by the Congressional Record and the Committee Reports was that damages were not to be collectible in such a case unless the employee was compelled to bring suit to obtain his overtime compensation.

(3) The court below disregarded the administrative interpretations of the Act, including the interpretations of the Administrator's representatives who dealt with Seneca and Lofton.

Reasons for Granting the Writ

The lower Court has rendered a decision in conflict with the decision of another Circuit Court of Appeals. The Circuit Court of Appeals for the Fourth Circuit on September 16, 1943, in *Guess* v. *Montague* (unofficially reported in 6 Wages and Hours Reporter 934), ruled that where employees were "admittedly * * * paid the entire balance due them as minimum wages or overtime compensation, and * * * have accepted it as full settlement of all claims under the Act," they are not entitled to bring suit thereafter for liquidated damages or attorneys fees.

In next to the last paragraph of the decision, the Court summarized its conclusion in the following language:

> "The result of our holding is that where an employer who has paid less than the minimum wages and overtime compensation prescribed by the Act makes settlement with the employee for the full amount due thereunder and the employee accepts same in full discharge and satisfaction of all claims against the employer, there is an end of liability, and the employer may not be harassed by further litigation. The condition, however, is that the employer pay the full amount of the balance of minimum wages and overtime compensation due. If he pays less than this, the settlement constitutes no bar. This rule, we think, is in strict accord with the provisions of the Act and of the public policy upon which it is based. It will encourage employers to settle claims for unpaid minimum wages and overtime compensation, with assurance that when a full and fair settlement is made there will be no danger of further liability. On the other hand, it will preserve the threat of recovery of liquidated damages if full payment of minimum wages and overtime compensation, as required by the Act, is not made. In

other words, it will encourage compliance with the law and minimize the opportunity to take unjust advantage of its provisions."

Contrast the opinion of the Tenth Circuit in the present case (p. 363):

> "* * * Concededly, the employer acted in the good faith belief that the employment was not covered by the Act, or that the employment contract fully complied with its requirements, and when it became reasonably apparent that the employment did come within the Act, the correct amount of overtime compensation was determined in accordance with the prescribed formula, and voluntarily paid without legal compulsion and before suit was filed.
>
> If any amount of good faith will excuse the payment of liquidated damages imposed by Section 16(b), it would seem wholly justified by the unchallenged factual findings of the trial court, but here the overtime compensation was not paid when due in the regular course of employment, because the parties did not believe it was owing. The violation was committed in good faith based upon a mistake of law. It was nevertheless a valid obligation, created by the applicable law, and failure to discharge it in accordance therewith constituted a violation of Sections 6 and 7 of the Act. Liquidated damages granted by Section 16(b) for violations of Sections 6 and 7 of the Act are mandatory, and not discretionary with the courts. It follows that courts are not authorized to exercise judicial discretion based upon good faith violations."

The employer in the Fourth Circuit and the employer in the Tenth Circuit each paid full overtime before being sued. Each payment was intended to be payment in full. Each employer was later sued for liquidated damages and attorneys fees. One was held liable, the other was not.

Although the Fourth Circuit attempted to avoid the appearance of direct conflict with the decision of the Tenth Circuit in the present case by suggesting that here the employee did not accept the employer's payment in full settlement, the opinion of the Tenth Circuit shows that this was not the ground for its decision and that a direct conflict does exist between the Circuits.

Not only is there a conflict between two Circuit Courts of Appeals, there is a decided lack of uniformity of decisions of other courts throughout the country.

There are decisions of a number of courts, including state courts of last resort, consistent with the decision of the Circuit Court of Appeals for the Tenth Circuit. Other decisions of equal importance are in accord with the decision of the Circuit Court of Appeals for the Fourth Circuit.

Decisions in agreement with the Circuit Court of Appeals for the Tenth Circuit are:

Emerson v. *Mary Lincoln Candy, Inc.*, 173 Misc. 531 (1940), affd. 261 App. Div. 879; 287 N. Y. 577 (1941);

Rigopoulos v. *Kervan*, 47 Fed. Supp. 576 (United States District Court for the Southern District of New York, 1942);

Colan v. *Wecksler*, 45 Fed. Supp. 508 (United States District Court for the Southern District of New York, 1942);

Abroe v. *Lindsay Bros.*, 211 Minn. 136 (Minnesota Court of Appeals 1941);

Philpott v. *Standard Oil Company of New Jersey*, 7 Labor Cases 61,697* (United States District Court for the Northern District of Ohio 1943).

* Not officially reported. Reported in Commerce Clearing House Labor Cases.

Decisions in accord with the decision of the Circuit Court of Appeals for the Fourth Circuit are:

J. F. Schneider & Son v. *Justice*, 293 Kentucky 126 (Kentucky Court of Appeals 1943);

David v. *The Atlantic Company*, 26 S. E. (2d) 650 [not officially reported] (Georgia Court of Appeals 1943);

Cissell v. *The Great Atlantic & Pacific Tea Co.*, 37 Fed. Supp. 913 (United States District Court for the Western District of Kentucky 1941);

Kidd v. *Royal Crown Bottling Co.*, 6 Labor Cases 61,385* (Court of Appeals [Eastern District of the State of Tennessee] 1942);

Ortiz v. *Compania Cervecera*, 6 Labor Cases 61,484* (United States District Court for the District of Puerto Rico 1943).

This is an important question of Federal Law which has not been, but should be, settled by this Court. Thousands of employers and employees are concerned with the present issue. The Regional Director of the Wage and Hour Division in the New York area has estimated that there are approximately seven hundred suits under the Fair Labor Standards Act presently pending in the states under his administration. Of this number it is estimated that not less than one hundred fifty involve the issue which is here under discussion. When we remember that a considerable number of plaintiffs frequently join in a single suit, that there are undoubtedly many other cases brought which have not come to the attention of the Regional Director and further, that for each suit brought there are undoubtedly many more disputes which have not reached active litigation, it becomes clear that there are thousands of em-

* Not officially reported. Reported in Commerce Clearing House Labor Cases.

ployers and employees directly concerned with this issue in the New York area alone.

Under the conclusion reached by the Circuit Court of Appeals for the Tenth Circuit, an employer who voluntarily complies with the statute and who makes litigation unnecessary by paying all of the overtime due to his employee will be liable for the penalty if such payments are not made currently. His penalty for voluntary compliance when he discovers his error will be as great as that of an employer who refuses to comply with the Act until his employee has engaged counsel and carried his case through the courts.

But whether the Tenth Circuit or the Fourth Circuit is correct is not now the issue. In either case there should not be one rule in the Fourth Circuit and in Georgia, Kentucky and Tennessee, another rule in the Tenth Circuit and in Minnesota, New York and Ohio.

This Court should issue the Writ of Certiorari and settle this important question.

Respectfully submitted,

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Amicus Curiae.

ADRIAN C. LEIBY,
Counsel.